Supreme Court, U.S.
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No. 95-___

In The

Supreme Court of the United States

October Term, 1995

MARTIN J. QUINN and
EDWARD C. McREADY,

Petitioners,

v.

ROBERT PITOFSKY, Chairman, Federal Trade Commission, and the FEDERAL TRADE COMMISSION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the *Age Discrimination in Employment Act* makes it illegitimate for an employer to discharge an employee for the purpose of generating cost savings where the cost savings are attainable *because of* the employee's pension status and age.

II. Whether the statistical comparison supporting a *prima facie* case of disparate impact discrimination from employer's facially neutral employment practice applied during a workforce reduction action should exclude employees not adversely affected by the employment practice from one side of the comparison and employees not eligible for the workforce reduction action from the other side.

III. Whether employer can satisfy its burden of showing the necessity for a facially neutral employment practice applied during a workforce reduction action and causing a disparate impact on a statutorily protected group of employees simply by showing the necessity for the underlying workforce reduction action, as opposed to showing the necessity for the employment practice itself.

PARTIES TO THE PROCEEDING

The names of all parties to this proceeding appear in the caption of the case.

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No. 95-___

In The

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MARTIN J. QUINN and
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v.

ROBERT PITOFSKY, Chairman of the Federal Trade Commission ("FTC"),[1] and the FTC,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

Martin J. Quinn and Edward C. McReady respectfully petition for a writ of certiorari to review the *Judgment* of the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") in this case.

[1] Mr. Pitofsky was sworn in as Chairman of the FTC subsequent to the initiation of this action and is automatically substituted for former Chairman Janet D. Stiger as a respondent. *See* S. Ct. R. 35.3.

OPINIONS BELOW

In the at-issue *Judgment*, the D.C. Circuit affirmed the March 28, 1994 *Judgment* of the United States District Court for the District of Columbia ("District Court") in this matter. The foregoing District Court *Judgment* was in favor of defendants/respondents on all of plaintiffs/petitioners' claims brought under the *Age Discrimination in Employment Act* ("ADEA"), codified as amended at 29 U.S.C. § 621 *et seq.* For the affirmance, the D.C. Circuit relied solely on the reasons stated by the District Court in its March 28, 1994 *Memorandum Opinion and Order* ("Opinion" or "Mem. Op.").

The at-issue D.C. Circuit *Judgment* is not reported and is reprinted in the Appendix ("App.") *infra* at A1-2. The March 28, 1994 District Court Opinion is not reported and is reprinted in the App. *infra* at B1-19.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). The at-issue D.C. Circuit *Judgment* was entered on February 27, 1995. App. at A1. Petitioners' request for a rehearing was denied by the D.C. Circuit in its order entered on May 11, 1995. *Id.* at C1.

STATUTES AND REGULATIONS

The statutory provisions and feder l regulations relevant to this petition appear in the App. *infra* at D1-4.

STATEMENT OF THE CASE

This case arises from decisions made by defendant FTC to terminate plaintiffs' employments as accountants in the agency's Bureau of Competition ("BC"). Pursuant to 29 U.S.C. § 633a(c), App. at D2, plaintiffs sued in District Court on, *inter alia*, several ADEA claims.[2] Plaintiffs appealed the District Court's *Judgment* for defendants to the D.C. Circuit under 28 U.S.C. § 1291.

Plaintiffs were terminated by the FTC in a workforce reduction action conducted under federal regulations at 5 CFR Part 351 -- such action referred to hereinafter as the *"Part 351 RIF."* Mem. Op., App. at B2. The FTC instituted the *Part 351 RIF* as the last in a series of personnel and non-personnel actions taken to generate cost savings in fiscal year 1989 (October 1, 1988 to September 30, 1989) due to a shortage of funds precipitated by a diminished budget for that period. *Id.* at B2, 6-8, 14. The *Part 351 RIF* decisions were made final on November 14, 1988, when plaintiffs and other FTC employees were notified that

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[2] At the time of the events giving rise to this action, plaintiffs qualified for ADEA coverage because they were both over the age of 39. Mem. Op., App. at B5; 29 U.S.C. § 631(a), *id.* at D1; *see also*, 29 U.S.C. § 633a(a), *id.* at D2 (ADEA applies to federal employees).

they would be discharged effective January 7, 1989. *Id.* at B2.

The issues raised here relate to certain of plaintiffs' ADEA claims under disparate treatment and impact theories of proof, as applied by the courts in cases brought under Title VII of the Civil Rights Act. This Court has held that ADEA liability can be established under the disparate treatment theory but has not decided the viability of disparate impact analysis in ADEA cases. *Hazen Paper Company* v. *Biggins*, ___ U.S. ___, 113 S.Ct. 1701, 1706 (1993), *citations omitted*. It is important to point out that, in ruling on plaintiffs' disparate impact claim, the lower federal courts assumed the applicability of disparate impact analysis in ADEA cases. Accordingly, plaintiffs will make the same assumption for purposes of this petition. In the event that this petition is granted, full briefing of this issue will be necessary.[3]

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[3] At least seven of the federal circuits have held that Title VII disparate impact theory applies to ADEA cases. *Holt* v. *Gamewell Corp.*, 797 F.2d 36 (1st Cir. 1986); *Geller* v. *Markham*, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981); *MacNamara* v. *Korean Air Lines*, 863 F.2d 1135 (3rd Cir. 1981), *cert. denied*, 493 U.S. 944 (1989); *Wooden* v. *Board of Education, Jefferson County*, 931 F.2d 376 (6th Cir. 1991); *Leftwich* v. *Harris-Stowe State College*, 702 F.2d 686 (8th Cir. 1983); *EEOC* v. *Borden's, Inc.*, 724 F.2d 1390 (9th Cir. 1984); *Allison* v. *Western Union Tel. Co.*, 680 F.2d 1318 (11th Cir. 1982). No federal circuit has ruled otherwise. Also, a federal regulation promulgated by the Equal Employment Opportunity Commission pursuant to the ADEA at 29 U.S.C. §§ 628 and 633a(b), App. at D1-2, supports application of the disparate impact theory in ADEA cases. *See*, 29 CFR § 1625.7(d), App. at D2 ("When an employment practice . . . has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity"); *Udall* v.

A. Disparate Treatment Claim

The disparate treatment claim relevant to this petition emanates from the decisions resulting in Quinn's discharge.[4] In significant part, Quinn's age was a determining factor in those decisions. Following are analyses of the pertinent, uncontroverted facts underlying this disparate treatment claim and the related issue raised for the Court's consideration.

There were several reasons for the FTC's decisions resulting in Quinn's discharge, the principal one being to generate cost savings for fiscal year 1989.[5] Mem. Op.,

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Tallman, 380 U.S. 1, 16-18 (1965) (While federal regulations are not binding on the courts, they are persuasive); *accord, Diaz* v. *Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971).

[4] BC made two specific decisions resulting in Quinn's discharge during the *Part 351 RIF*. First, BC decided to abolish his accountant position along with four of the seven other accountant positions then existing in BC. Mem. Op., App at B11-12. Second, BC decided not to offer him continuing employment even though he qualified for a vacant compliance specialist position, a position given instead to Ernest Cowan, whose BC accountant position had, like Quinn's, been abolished during the *Part 351 RIF*. *Id.* at B4 (n. 1), 12. The compliance specialist position was given to Cowan to satisfy his *Part 351 RIF* assignment rights to other occupied BC positions. *Id.* at B12.

[5] The agency's need to generate cost savings in fiscal year 1989 motivated both of the decisions resulting in Quinn's discharge, *i.e.*, the decision to abolish his position and the decision not to offer him continuing employment (*see*, note 4, *supra*). Mem. Op., App. at B2. In addition, the agency gave separate reasons for each of those decisions. The reason asserted for the specific decision to abolish Quinn's position (along with four of the other seven BC accountant positions) was that BC

App. at B2 ("The FTC took this personnel action . . . [because of] a diminished budget"); *id.* at B10 (The FTC "specifically instructed [BC] that it had to save $150,000 as a result of personnel actions"); *accord, id.* at B5-8, 14, 15.

Cost savings were attainable and generated by the FTC in fiscal year 1989 from Quinn's discharge because of his pension status and age. *Id.* at B4-5. At the time of his discharge, Quinn was 52 years old with over 20 years of federal service. *Id.* at B5. As a matter of law, an employee over the age of 49 with 20 or more years of federal service (like Quinn) is forced into retirement and must accept an annuity in lieu of severance pay if discharged in a *Part 351 RIF*. *See*, 5 U.S.C. §§ 5595(a)(2)(iv) and 8336(d), App. at D2-3. Also, as a matter of law, retirement annuities are paid from a fund administered by the U.S. Treasury rather than by the annuitant's agency; whereas, severance payments, if required, must be made by the employee's agency. *See*, 5 U.S.C. §§ 5595(b) and 8348(a), (b), App. at D3-4. Thus, upon his discharge, Quinn started receiving an annuity from U.S. Treasury funds and the FTC was relieved from making any further payments to him. Mem. Op., App. at B5; *see also, id.* at B15 (FTC/BC knew of

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had determined that "three accountants could do the work currently being performed by eight" -- hereinafter, the *"accountant workforce reduction motive."* *Id.* at B11; *accord, id.*, at B14-15. The reason asserted for the specific decision not to offer Quinn continuing agency employment in the form of the vacant compliance specialist position was that BC had determined that to do so would have caused greater staff disruption than occurred by placing Cowan in that position -- hereinafter, the *"minimal disruption motive."* *Id.* at B15.

Quinn's pension status when making the decisions resulting in his discharge).

In short, the undisputed facts show that the chief reason for Quinn's discharge was to generate cost savings which resulted because of his pension status and age -- hereinafter, the *"cost savings/pension status/age based motive."* The specific question raised then is: whether the ADEA makes illegitimate the *cost savings/pension status/age based motive* underlying Quinn's discharge.

The answer to this question governs the allocation of the burdens of proof in this case. While " '[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff,' " *id.* at B14 (*citation omitted*), the parties' burdens of proof in this case will vary depending whether the *cost savings/pension status/age based motive* is treated as legitimate or illegitimate under the ADEA. Assuming *arguendo* that all of the other reasons for the decisions underlying Quinn's discharge were legitimate, the treatment given the *cost savings/pension status/age based motive* is crucial.

If the *cost savings/pension status/age based motive* is also deemed legitimate, the standards of proof adopted by this Court in *McDonnell Douglas* v. *Green*, 411 U.S. 792 (1973) and *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981) must be applied. The *McDonnell Douglas/Burdine* standards apply when only legitimate motives underlie the employment decision. *See, NLRB* v. *Trans. Management Corp.*, 462 U.S. 393, 400 n.5 (1983). Under these standards, the employee has the ultimate burden of proving by a preponderance of evidence that

the legitimate reasons were not the true reasons, but were a "pretext" for discrimination. *Burdine*, 450 U.S. at 252-53.

If, on the other hand, the *cost savings/pension status/age based motive* is deemed to be illegitimate under the ADEA, then this becomes a "mixed-motives" case, requiring application of the standards of proof mandated in *Price Waterhouse* v. *Hopkins*, 490 U.S. 288 (1989). In a "mixed-motives" case, employees do not have the onerous *McDonnell Douglas/Burdine* burden of proving that the employer's legitimate reasons for its decisions were not the true reasons. *Price Waterhouse*, 490 U.S. at 247 ("Where a decision was the product of a mixture of legitimate and illegitimate motives, . . . it simply makes no sense to ask whether the legitimate reason was . . . [the true reason] . . . for the decision — which is the question asked by *Burdine*.") Instead, it is the employer's burden in a "mixed-motives" case to prove by a preponderance of evidence that those decisions would have been made for legitimate reasons, standing alone. *Id.*, 490 U.S. at 252.

In the instant case, the lower courts determined, in effect, that all of the reasons for the decisions resulting in Quinn's discharge -- including the *cost savings/pension status/age based* motive -- were legitimate under the ADEA. Mem. Op., App. at B14-15. This determination triggered application of the *McDonnell Douglas/Burdine* standards. *Id.* Ultimately, the lower courts concluded that age was not a determining factor for the decisions resulting in Quinn's discharge. *Id.* This was so, according to the lower courts, because plaintiffs had failed to show that the reasons for the decisions resulting in Quinn's discharge were not the true reasons, as required by *McDonnell Douglas/Burdine*. *Id.*

The crux of plaintiffs' disparate treatment claim in this petition is that the lower courts erred as a matter of law in ruling that the *cost savings/pension status/age based motive* was legitimate under the ADEA. As more fully explained herein, this ruling conflicts with the clear language and intent of the ADEA which makes it unlawful to discharge an employee "because of" the employee's age. *See*, 29 U.S.C. § 623(a)(1), App. at D1.

It is important to stress that the *cost savings/pension status/age based motive* underlying Quinn's discharge encompasses three factors. Further, each of the factors is a "proxy" for each of the other factors, " . . . not in the sense that the ADEA makes the . . . factors equivalent, . . . but in the sense that the employer may suppose a correlation between the . . . factors and act accordingly." *Hazen*, 113 S.Ct. at 1707. In other words, the FTC acted to terminate Quinn's employment because a correlation existed between: (1) the FTC's need to generate cost savings; (2) Quinn's pension status; and, (3) his age.

Common sense dictates that, if an employer makes decisions resulting in an employee's discharge to generate cost savings and the cost savings result "because of" the employee's age, then the employer's decisions are "because of" the employee's age. Thus, the FTC's decisions made to generate cost savings from Quinn's forced retirement which resulted "because of" his age were decisions made "because of" his age and prohibited by the ADEA.

This Court has not decided the disparate treatment issue raised here, *i.e.*, whether an employee's discharge motivated by his or her pension status and age violates

the ADEA. In *Hazen*, the Court expressly deferred ruling on this issue. There, it was held that firing an employee to prevent his pension benefits from vesting does not violate the ADEA where the vesting is based on years of service and not age. *Hazen*, 113 S.Ct. at 1706-07. That, however, does not "rule out the possibility of . . . liability under . . . the ADEA where the decision to fire the employee was motivated both by the employee's age and by his pension status." *Hazen*, 113 S.Ct. at 1707. Presumably, the Court elected not to decide this issue in *Hazen* because that case, unlike the case at bar, did not present the appropriate factual pattern for rendering a decision.

At least one Circuit court, however, has addressed and decided this issue. Specifically, the Third Circuit held that an employer's decision to discharge a retirement eligible employee in order to reduce the employer's expenditures by forcing the employee into retirement is illegal under the ADEA, particularly where, as in the instant case, the employee's retirement eligibility is directly attributable to his or her age. *EEOC* v. *City of Altoona, Pa.*, 723 F.2d 4, 6-7 (3rd Cir. 1993) (Economic considerations cannot justify age discrimination); *see also, Harris* v. *Nat'l Cap. Planning Comm.*, EEOC No. 01890613, FEOR at XII-1610, 1614, n. 8 ("[A]s a matter of law, use of retirement eligibility as the basis for an employment decision is unlawful age discrimination. *** This is because '[r]etirement status is not an age-neutral factor. . . . It is related . . . to age' and is therefore a proxy for age"), *citing and quoting from, EEOC* v. *West. Elec. Corp.*, 632 F. Supp. 343, 367 (E.D. Pa. 1986).

The lower courts' error in treating the *cost savings/pension status/age based motive* as legitimate under the ADEA caused the lower courts to apply the wrong standards of

proof in assessing defendants' ADEA liability. Had the lower courts determined this motive to be illegitimate in a manner consistent with the language and intent of the ADEA and the Third Circuit's decision in *Altoona*, the *Price Waterhouse* standards for "mixed-motives" cases would have been mandated. Application of the *Price Waterhouse* standards for "mixed-motives" cases would have likely produced a conclusion that plaintiffs were entitled to recovery on their disparate treatment claim pertaining to Quinn's discharge.[6]

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[6] The D.C. Circuit has adopted this Court's four-justice plurality view in *Price Waterhouse* that the defendant/employer's evidence in a "mixed-motives" case must amount to "objective evidence" -- the equivalent of an "affirmative defense." *Hopkins* v. *Price Waterhouse*, 920 F.2d at 967, 972, 973 (D.C. Cir. 1990); *USIA* v. *Krc*, 989 F.2d 1211, 1214 (D.C. Cir. 1993) and at 1222-23 (Wald, J., dissenting in part), *citing Price Waterhouse*, 490 U.S. at 252. At no time during the entire trial proceeding in this matter did defendants produce any "objective evidence" whatsoever to show that, if there had been no attendant cost savings accruing from Quinn's termination, they would have made either the decision to: (1) abolish his position on the basis of BC's *accountant workforce reduction motive* (*see*, note 4, *supra*), standing alone; and, (2) not offer him continuing agency employment on the basis of BC's *minimal disruption motive* (*id.*), standing alone. In fact, there was substantial record evidence produced at trial showing that, in the absence of the need to generate cost savings for fiscal year 1989, the agency would not have made the decisions resulting in Quinn's discharge. For instance, the agency's Director of Personnel testified at trial that she doubted that there would have been a *Part 351 RIF* had their been no budget shortfall in fiscal year 1989. The Personnel Director's testimony shows, at the very least, that the FTC would not have even undertaken a *Part 351 RIF* to abolish five BC accountant positions, including Quinn's, solely on the basis of the *accountant workforce reduction motive*.

B. Disparate Impact Claim

The disparate impact claim relevant to this petition arises from an employment practice applied by BC during the implementation of the *Part 351 RIF*. The District Court correctly summarized the law with respect to disparate impact as follows: "Disparate impact occurs when an employer's business practice, although neutral on its face, operates to disproportionately disfavor a protected group in a manner that cannot be justified by a business necessity. *** A disparate impact case proceeds in three phases. First, the plaintiff must establish a prima facie case by showing that a facially neutral employment practice had a significant impact on a protected group. *** It is not necessary for the employee to prove a discriminatory intent on the part of the employer. *** Once a plaintiff establishes a prima facie case, the burden shifts to the employer to show that the challenged practice constituted a business necessity. *** If the employer meets this burden, the plaintiff must then prove that there were available alternatives with a lesser disparate impact that serve the business needs of the employer. ***" Mem. Op., App. at B16-17, *citations omitted*.

The employment practice challenged here was BC's decision to select from the positions eligible for abolishment during the *Part 351 RIF* those positions whose elimination would abate perceived grade-skills mix imbalances -- hereinafter, the "*staff imbalance abatement practice.*" While facially neutral, this employment practice had a significant disparate impact on BC employees over the age of 39. Following are analyses of the pertinent, uncontroverted facts underlying this disparate impact claim and the related issues raised for the Court's consideration.

In October of 1988 (before the *Part 351 RIF* decisions were made), there were 222 BC employees. *Id.* at B3. Seven of these 222 employees held Senior Executive Service ("SES") positions which, pursuant to federal regulations at 5 CFR § 351.202(b)(1), App. at D4, were *not* eligible for abolishment in a *Part 351 RIF* action; the remaining (215) were in the competitive and excepted services.[7] Mem. Op., App. at B3. Five of the competitive and excepted service BC employees occupied temporary positions; the rest (210) occupied permanent positions. *Id.* at B10-12. Of the five BC employees in the temporary positions, four were classified as student assistants (hereinafter, *"the four student temporaries"*), while one (Joseph Branch) served in an accountant position. *Id.*

Sometime in October of 1988 (again, before the *Part 351 RIF* decisions were made), the FTC/BC instituted, *inter alia*, two non-*Part 351 RIF* type personnel actions which were intended to limit the size of the *Part 351 RIF*. First, the FTC offered early-out retirements to eligible employees; six BC employees accepted the agency's offer (hereinafter, *"the six early-outs"*). *Id.* at B3, 9. Second, BC decided to terminate *the four student temporaries* and notified them of that decision. *Id.* at B10-11.[8]

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[7] Federal employees are classified in either the competitive service, the excepted service, or the SES. *U.S.* v. *Fausto*, 484 U.S. 439, 442, n.1 (1988).

[8] There is a glaring inconsistency in the District Court's findings regarding BC's treatment of the five BC employees occupying temporary positions. Specifically, the District Court first found that BC decided to terminate "all five" of its temporary employees "[b]efore [deciding to] abolish[] any permanent positions," but then found that BC decided to abolish one of

On November 14, 1988, the day *Part 351 RIF* decisions were communicated to all affected agency employees, the adjusted competitive and excepted service BC employee registers reflected that the BC "employee population . . . totalled 201, of which . . . 100 [or 49.8%] were [over age 39] . . . . " *Id.* at B3. Excluded from the foregoing BC "employee population" of 201 were those: (1) excluded as a matter of law from consideration for the *Part 351 RIF* action, *viz.*, the seven SES employees; and, (2) BC had decided would be terminated (either voluntarily or involuntarily) before it decided which positions to abolish during the *Part 351 RIF* action, *viz., the six early-outs* and *the four student temporaries. Id.; see also,* note 8, *supra.* In other words, it was only these 201 BC employees who were eligible for adverse treatment during the *Part 351 RIF.*

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those five temporary positions, *i.e.*, the temporary accountant position occupied by Branch, during the implementation of the *Part 351 RIF* at the same time it decided which permanent positions to abolish. Mem. Op. B10-12.

The record evidence shows that: (1) only the decision to terminate *the four student temporaries* was made before BC decided which positions to abolish during the *Part 351 RIF;* and, (2) the decision to abolish Branch's temporary position was made during the *Part 351 RIF* and at the same time BC decided which permanent positions to abolish. Thus, the record evidence supports the District Court's finding that Branch "was a temporary employee but his position was abolished by the [Part 351] RIF," *id.* at B11, n. 10; however, the record evidence does not support the District Court's inconsistent finding that BC decided to terminate "all five" of its temporary employees, including Branch, before deciding which permanent positions to abolish.

In making its *Part 351 RIF* decisions, BC applied the *staff imbalance abatement practice*, targeting for abolishment principally positions occupied by accountants, administrative officers, research analysts, and grade 15 attorneys. *Id.* at B10-12. As a result, 14 competitive and excepted service BC employees were either terminated or demoted. *Id.* at B17. Of these 14 adversely affected BC employees, 11 (or 78.6%) were over age 39. *Id.*

On the basis of the foregoing, plaintiffs made, and fully documented, the following statistical comparison at trial to show the significance of the disparate impact caused by *the staff imbalance abatement practice*: 11 (or 78.6%) of the 14 BC employees adversely affected by application of this practice were over age 39; whereas, only 100 (or 49.8%) of the 201 BC employees in positions eligible for abolishment during the *Part 351 RIF* were over age 39. *Id.*

In pertinent part, the lower federal courts concluded that: (1) plaintiffs failed to establish a *prima facie* case of disparate impact age discrimination on BC employees over age 39 from the *staff imbalance abatement practice* solely because their statistical comparison, although "present[ing] a statistically significant disparate impact," was "unreliable" due to the fact that it excluded 17 BC employees -- the seven SES employees, *the four student temporaries*, and *the six early-outs*; and, (2) even if plaintiffs had established a *prima facie* disparate impact case, they could not prevail because defendants "established a business necessity for their decision" to undertake a *Part 351 RIF*. *Id.* at B17-18. For reasons detailed below, the essence of plaintiffs' disparate impact claim in this petition is that

the lower courts erred as a matter of law in drawing these two conclusions.

With respect to the lower courts' conclusion that plaintiffs' statistical comparison was "unreliable," the issue raised for this petition involves both sides of the statistical comparison required to support an employee's *prima facie* case of disparate impact discrimination. On the one side, the question is which employees should be included in the "at-issue" category of employees; on the other side, the inquiry is which employees should be included in the "qualified" category of employees.

In *Wards Cove Packing Co.* v. *Antonio*, 490 U.S. 642 (1989), a Title VII case involving claims of discrimination in hiring and promotion practices, this Court laid down the parameters for determining the significance of the disparate impact due to an employer's facially neutral employment practice. Specifically, the Court held that the percentage of the "at-issue" jobs occupied by a statutorily protected group of employees must be compared to the percentage of the "qualified" jobs occupied by the same protected group. *Wards Cove*, 490 U.S. at 650-51. The "at-issue" jobs are those occupied by employees adversely affected by application of the employment practice; the "qualified" jobs are those from which the "at-issue" jobs are selected. *Id.* In a *Part 351 RIF* action context then, the "at-issue" employees are those adversely affected during the action by application of the employment practice and the "qualified" employees are those occupying positions eligible for abolishment during the action.

The logical inference from the lower courts' conclusion that plaintiffs' statistical comparison was "unreliable" since it excluded the seven SES employees, *the four student temporaries*, and *the six early-outs* is that all or some of these 17 BC employees should have been included in either the "at-issue" or "qualified" categories, or both.

The lower courts' conclusion aside, however, the facts show that it was proper for plaintiffs to exclude the 17 BC employees from both sides of the statistical comparison since none of them was either: (1) an "at-issue" employee, *i.e.*, one adversely affected by *the staff imbalance abatement practice*; or, (2) a "qualified" employee, *i.e.*, one occupying a position eligible for abolishment during the *Part 351 RIF* action. This is so because: (1) the seven SES employees were not legally eligible for a *Part 351 RIF*, *see*, 5 CFR § 351.202(b)(1), App. at D4, and only competitive and excepted service employees (no SES employees) were adversely affected by the *staff imbalance abatement practice*; (2) the *four student temporaries* were notified of their employment separations, and involuntarily terminated, as part of a non-*Part 351 RIF* action instituted to limit the size of the *Part 351 RIF* before application of the *staff imbalance abatement practice*; and (3) the decision to allow *the six early-outs* to take voluntary retirement likewise resulted from a non-*Part 351 RIF* action undertaken to limit the size of the *Part 351 RIF* and was made before application of the *staff imbalance abatement practice*.

The second disparate impact issue raised for this petition pertains to an employer's burden of proof in a case where an employee has shown a *prima facie* case of disparate impact discrimination from the employer's

facially neutral employment practice applied during a particular workforce reduction action. Specifically, the question is whether the employer can avoid liability by merely showing a business necessity for the particular workforce reduction action or must the employer show a business necessity for the employment practice itself.

As shown, the lower federal courts decided, in essence, that the FTC did not have to show a necessity for the *staff imbalance abatement practice*. Mem. Op., App. at B18. Rather, according to the lower federal courts, all that the FTC had to, and did, do in this case, was show a necessity for its decision to implement a *Part 351 RIF*. *Id.*

The lower courts' decision in this regard conflicts with the universally recognized principle of law requiring the employer to show a necessity for the specific, clearly delineated employment practice that causes a disparate impact on a statutorily protected group of employees. This Court and the Federal Circuit Courts have implicitly endorsed such a principle in the context of Title VII disparate impact analysis. *See e.g., Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1970); *accord, AFSCME* v. *State of Washington*, 770 F.2d 1401, 1405 (9th Cir. 1985) ("Disparate impact analysis is confined to cases that challenge a specific, clearly delineated employment practice applied at a single point in the . . . [employment decision] process.") Moreover, this sound principle has been explicitly incorporated into federal regulations promulgated under the ADEA. *See*, 29 CFR § 1625.7(d), App. at D2, ("When an employment practice . . . has a disparate impact on individuals within the protected age group, it can only be justified as a business necessity.")

The important distinction to make here, and one the lower courts missed, is this: In the instant case, plaintiffs do not contend that the FTC's decision itself to implement a *Part 351 RIF* caused a disparate impact on BC employees over age 39; rather, it is plaintiffs' claim that said disparate impact was caused by the *staff imbalance abatement practice*, applied during the implementation of the *Part 351 RIF*. For its conclusion that defendants had satisfied their business necessity burden, the lower courts found only that the "FTC faced a substantial budget shortfall for fiscal year 1989, *etc.*" Mem. Op., App. at B17. This finding would support a conclusion that there was a necessity for the FTC's decision to implement a *Part 351 RIF* -- a decision not challenged as causing the disparate impact in this case. However, the lower courts' finding clearly does *not* support a conclusion that there was a necessity for BC to apply the *staff imbalance abatement practice* -- the business practice challenged as causing the disparate impact in this case.[9]

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[9] At trial, defendants proffered absolutely no record evidence to show that the *staff imbalance abatement practice* was a business necessity. The FTC did not introduce any oral or documentary evidence at trial to show that BC was unable to fulfill its mission with the alleged grade-skills mix imbalances existing prior to the *Part 351 RIF*. Indeed, there is record evidence showing that BC could in fact fulfill its mission with the alleged grade-skills mix imbalances existing prior to the *Part 351 RIF*. This evidence appears in the trial testimony of the FTC's Director of Personnel wherein she averred that she doubted there would have even been a *Part 351 RIF* had there not been a budget shortfall in fiscal year 1989. *See*, note 6, *supra*. The Personnel Director's testimony in this regard shows that BC's

REASONS FOR GRANTING THE PETITION

This petition calls the Court's attention to at least three important federal issues -- one relating to plaintiffs' disparate treatment claim and two emanating from their disparate impact claim. For the reasons stated below, the D.C. Circuit's decisions with respect to these three issues merit this Court's review.

I. D.C. CIRCUIT'S RULING THAT ADEA DOES NOT MAKE IT ILLEGITIMATE FOR AN EMPLOYER TO DISCHARGE AN EMPLOYEE TO GENERATE COST SAVINGS WHICH ARE ATTAINABLE "BECAUSE OF" THE EMPLOYEE'S PENSION STATUS AND AGE CONFLICTS SHARPLY WITH ADEA LANGUAGE AND INTENT AND WITH A THIRD CIRCUIT DECISION, AND FURTHER, INVOLVES AN IMPORTANT FEDERAL QUESTION WHICH THIS COURT SHOULD DECIDE.

As stated, the disparate treatment issue raised for this petition concerns whether the ADEA prohibits the discharging of an employee to generate cost savings where the cost savings are attainable because of the employee's pension status and age. In ruling that the *cost savings/pension status/age based motive* underlying Quinn's discharge is legitimate, the lower federal courts in the case at bar effectively decided that the ADEA does not

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perceived grade-skills mix imbalances were not deemed significant enough, standing alone, to force the FTC to undergo a *Part 351 RIF* action; otherwise, the Personnel Director would have testified that the FTC would have instituted such an action even if there had been no budget shortfall in fiscal year 1989.

prohibit discharging an employee under such circumstances.

The lower federal courts' ruling in this instance embodies a principle which would allow employers to discharge employees, who, because of their advanced age, are eligible for retirement and to do so for economic considerations standing alone. As this petition shows, such a principle violates the express language and intent of the ADEA. *See*, 29 U.S.C. § 623(a)(1), App. at D1, ("It shall be unlawful for an employer . . . to discharge any individual . . . *because of* such individual's age") (emphasis supplied). This principle is also inconsistent with the decision enunciated by the Third Circuit in *Altoona*. *Altoona*, 723 F.2d at 6-7 (Employer's decision to discharge a retirement eligible employee in order to reduce expenditures is illegal under the ADEA). To plaintiffs' knowledge, no other Circuit has taken a position contrary to that espoused by the Third Circuit in *Altoona*, until now -- *i.e.*, by virtue of the D.C. Circuit's endorsement of the pertinent rulings made by the District Court in this case.

Unlike *Hazen*, the case at bar provides the precise factual pattern upon which to resolve this important question of federal law, *i.e.*, whether ADEA liability exists "where the decision to fire the employee was motivated both by the employee's age and by his pension status." *Hazen*, 113 S.Ct. at 1707. This is an issue which should be settled by this Court, all the more so because of the inconsistencies resulting from the lower courts' holding in the instant case *vis-a-vis* the language and intent of the ADEA and the Third Circuit's ruling in *Altoona*.

II. D.C. CIRCUIT'S RULING THAT EMPLOYEES NOT ADVERSELY AFFECTED BY A CHALLENGED EMPLOYMENT PRACTICE APPLIED DURING A WORKFORCE REDUCTION ACTION AND EMPLOYEES NOT ELIGIBLE FOR SAID ACTION SHOULD BE INCLUDED IN THE STATISTICAL COMPARISON SUPPORTING *PRIMA FACIE* CASE OF DISPARATE IMPACT EMPLOYMENT DISCRIMINATION CONFLICTS WITH THIS COURT'S DECISION IN *WARDS COVE.*

As shown, the first disparate impact issue raised for this petition involves both sides of the statistical comparison needed to support a *prima facie* case of disparate impact employment discrimination -- those sides being the "at-issue" employees and the "qualified" employees. In ruling that plaintiffs' statistical comparison was "unreliable" in the case at bar, the lower courts implicitly decided that: (1) employees not adversely affected by a challenged facially neutral employment practice applied during a workforce reduction action should be included in the "at-issue" category of employees; and, (2) employees not eligible for the workforce reduction action should be included in the "qualified" category.

This ruling is inconsistent with the *Wards Cove* mandate that "at-issue" employees are only those adversely affected by a facially neutral employment practice and "qualified" employees are only those from whom the "at-issue" employees are selected. *Wards Cove,* 490 U.S. at 650-51. For this reason alone, the Court's review is warranted.

III. D.C. CIRCUIT'S RULING THAT EMPLOYER CAN SATISFY ITS BURDEN OF SHOWING NECESSITY FOR PRACTICE APPLIED DURING WORKFORCE REDUCTION ACTION AND CAUSING DISPARATE IMPACT ON STATUTORILY PROTECTED GROUP OF EMPLOYEES SIMPLY BY SHOWING NECESSITY FOR REDUCTION ACTION CONFLICTS WITH PRINCIPLES OF LAW IMPLICIT IN THIS COURT'S *GRIGGS* DECISION AND DECISIONS OF OTHER FEDERAL CIRCUITS AS WELL AS WITH REGULATIONS PROMULGATED UNDER ADEA.

As also shown, the second disparate impact issue raised for this petition concerns the employer's burden required to avoid liability for a facially neutral employment practice applied during a workforce reduction action and causing a disparate impact on a statutorily protected employee group. Specifically, the question is whether, in such circumstances, the employer need only demonstrate a business necessity for the workforce reduction action or must the employer prove a business necessity for the employment practice itself.

In the instant case, the D.C. Circuit, by its endorsement of the District Court Opinion, has adopted a principle which allows the employer to escape liability for the disparate impact caused by a specific employment practice without having to show a necessity for the practice. Such a principle is inconsistent with: (1) sound principles of employment discrimination law endorsed by this Court in cases such as *Griggs* and by Federal Circuit Courts in other cases (*see, e.g., AFSCME, supra*); and, (2) federal regulations (*see*, 29 CFR § 1625.7(d), App. at D2)

promulgated under the ADEA. Accordingly, this Court's review is merited.

CONCLUSION

For all of the foregoing reasons, it is requested that this petition be granted.

Respectfully submitted,

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-5141 **September Term, 1994**

Edward C. McReady, et al.,

Appellants

v.

Janet D. Steiger, Chairman
Federal Trade Commission, et al.,

Appellees

On Appeal from the United States District Court
for the District of Columbia

Before: **EDWARDS**, Chief Judge, **GINSBERG** and **HENDERSON**, Circuit Judges

JUDGMENT

(Filed Feb. 27, 1995)

This cause came to be heard on the appeal from the judgment of the District Court in favor of defendants, and was briefed and argued by counsel. The issues have been accorded full consideration by the Court and occasion no need for a published opinion. *See* D.C. Cir. Rule 36(b). For the reasons stated in the opinion of the District Court, it is

ORDERED and **ADJUDGED** that the judgment of the District Court is affirmed.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 41.

Per Curiam
FOR THE COURT:

By: /s/ Eva Brown
Deputy Clerk

Bills of cost must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EDWARD C. McREADY, *et al.*, Plaintiffs, v. JANET D. STEIGER, Chairman of the Federal Trade Commission, *et al.*, Defendants.	Civil Action No. 90-1457 (JHG)

MEMORANDUM OPINION AND ORDER

(Filed Mar. 28, 1994)

Plaintiffs, Edward C. McReady ("McReady") and Martin J. Quinn ("Quinn"), commenced this action alleging that they were separated from their employment at defendant Federal Trade Commission ("FTC" or "agency") in violation of the Civil Service Reform Act ("CSRA"), codified at 5 U.S.C. § 1301 *et seq.* and related regulations, and the Age Discrimination in Employment Act ("ADEA"), codified at 29 U.S.C. § 633a *et seq.* This matter came before the Court for *de novo* review after the Merit Systems Protection Board denied these claims. *See* 29 U.S.C. § 633a(c). The Court granted defendants' motion for summary judgment with respect to the CSRA claims and this matter proceeded to a bench trial with regard to plaintiffs' ADEA claims. At the conclusion of the bench trial, the parties submitted proposed findings of fact and conclusions of law. Upon consideration of the

record and evidence introduced at the bench trial, including the testimony of witnesses whose credibility, demeanor, and behavior the Court has had an opportunity to evaluate, judgment is entered in favor of defendants and against plaintiffs.

I. Findings of Fact

On November 14, 1988, plaintiffs received notice that they were going to be separated from their positions as accountants with the FTC effective January 7, 1989. The FTC took this personnel action pursuant to an agency-wide reduction-in-force ("RIF") precipitated by a diminished budget. To address properly plaintiffs' claims, it is necessary to review the structure of the FTC at the time of the RIF, plaintiffs' employment history, the circumstances leading to the RIF, RIF procedures, and the consequences of the RIF.

A. The Federal Trade Commission

At the time of the events in question, a chairman and four commissioners headed the FTC. Beneath this top layer were a number of offices and bureaus. These offices and bureaus included the Office of the Executive Director ("OED"), the Bureau of Economics ("BE"), and the Bureau of Competition ("BC"), the bureau in which both plaintiffs worked. Each of the offices and bureaus had its own hierarchical structure. Atop the BC was the director, Jeffrey Zuckerman, and two deputy directors, Barbara Clark ("Clark") and Terry Winslow. These three individuals made the management decisions relevant to the RIF. The BC was then divided into a number of divisions,

including the Premerger Notification Office ("PN Office"), the Accounting Office and two general litigation offices.

The FTC spends approximately 73-75% of its budget on personnel, making personnel cost the agency's major budget item. Although this case originally began with a focus on the personnel in the entire agency, plaintiffs stipulated at trial that the focus of the case would only be the personnel in the BC. Transcript of Bench Trial, *Edward C. McReady v. Janet D. Steiger*, C.A. No. 90-147 (JHG) (D.D.C. October 15-25, 1993) ("Transcript") at 284.

On October 24, 1988, there were 222 employees in the BC, 112 ages 40 or older and 110 younger than 40. Included in this overall population are the seven employees in the Senior Executive Service ("SES"), of which five were ages 40 or older. Between October 24, 1988, and November 14, 1988, 14 employees left the BC for various reasons: six accepted early-out retirement, four resigned, and four left the BC for other reasons. All six early-out retirees were over age 40, all four of the employees who resigned were younger than 40, and three of the others who left were younger than 40. Thus, on November 14, 1988, the employee population of the BC, excluding the SES employees, totalled 201, of which 101 were younger than age 40 and 100 were ages 40 or older. Including the SES employees, the population at the BC on November 14, 1988, was 208, 103 younger than age 40 and 105 age 40 or older.

B. Plaintiffs' Employment History

Quinn began his employment with the FTC as a 510 series accountant in the BE in 1967. After one year, he left the FTC to work for the Defense Supply Agency. In August 1970, he returned to the FTC as a 510 series accountant in the Accounting Office in the BC. Quinn worked for seven years in the Accounting Office, then transferred to the OED where he worked for three and one-half years, and then transferred back to the BC to work in the Accounting Office.

Quinn remained in the Accounting Office until May 1987, except for six weeks that he spent in the PN Office. During this six week period, Patrick Sharpe, a compliance specialist, trained Quinn in the duties and responsibilities of a compliance specialist. Quinn gave uncontradicted testimony that the duties and responsibilities of a compliance specialist are 95-99% identical to those of an accountant; the only difference is that an accountant spent 1-5% of his time doing complex accounting work.

In May 1987, Quinn was permanently transferred to the PN Office. Although he remained a GM 510 series accountant, Quinn's work in the PN Office differed from his work in the Accounting Office. He did not need to be retrained, however, due to his prior experience in the PN Office. After the transfer, Quinn asked to be reclassified from an accountant series to a compliance specialist. This request was denied because Quinn had insufficient experience as a compliance specialist to sustain his grade 13 pay level.[1]

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[1] It is, however, undisputed that Quinn and McReady both were qualified to perform the duties and responsibilities of a compliance specialist. Transcript at 349.

By November 1988, Quinn, then 52 years old, had worked as a GM 510 series grade 13 accountant for the FTC for over 19 years--1 year in the BE, 3.5 years in the OED, 13.5 years in the Accounting Office in the BC, and 1.5 years in the PN Office in the BC. Upon his separation, Quinn received an annuity but no severance pay due to his age and years of service.[2]

Similar to Quinn, McReady spent the majority of his career with the FTC. After four and one-half years in private practice, McReady went to work for the Securities and Exchange Commission, where he worked for five years as a 510 series grade 13 accountant and for one year as an attorney. McReady then began work at the FTC as a grade 14 accountant in the BE. In 1983, after eight and one-half years in the BE, McReady moved to the Accounting Office in the BC as a GM 510 series grade 14 accountant. By November 1988, McReady, who was then 45 years of age, had worked approximately 13.5 years at the FTC. McReady received severance pay upon his separation because he was less than 50 years old with more than 20 years of government service.[3]

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[2] Subsequent to his separation, Quinn registered with the two placement programs for employees separated in a RIF. Plaintiffs have identified two positions for which Quinn was eligible but not selected. Neither of these positions was available for Quinn. The first opening occurred in occupational series 560, a series for which Quinn did not register. The second opening was filled by a 44 year old 10-point veteran with placement rights superior to Quinn's and occurred after the expiration of Quinn's eligibility for the programs.

[3] McReady received severance pay from January 1989 until he commenced employment at another federal position in November of that year.

C. Circumstances Leading to the RIF[4]

In June 1988, the appropriations committees of both the Senate and House of Representatives notified the FTC that its budget appropriation for the upcoming year would be less than it anticipated. The timing of the notification allowed the agency to analyze the impact of this request and report back to Congress before the budget became final in the fall.

Faced with a $4 million budget shortfall for fiscal year 1989, the FTC tried to reduce "margin" costs, which include nonpersonnel expenditures such as supplies, materials, and certain costs associated with contracts. There was insufficient flexibility in these items to offset the entire shortfall because the FTC had been downsizing since 1979-80 and because at least 73% of the FTC budget was personnel driven.

Consequently, some personnel action was necessary. The agency first determined how much money could be saved if it did not replace departing employees unless a critical position needed to be filled. After making these calculations, however, the agency still needed to save almost $2 million. This continued shortfall presented FTC with a much more difficult problem. The only other available source of funds was the personnel compensation and benefit accounts. The agency informed the congressional appropriations committees that it would be forced to take

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[4] Robert Walton ("Walton"), Executive Director of the FTC, and Rosemarie Straight ("Straight"), Director of the Division of Personnel, credibly testified to this background information.

personnel actions--either furloughs or a RIF--if the budget remained as anticipated.

Congress did not alter the budget in response to the agency request, and the agency faced a $4 million shortage of funds for fiscal year 1989. The FTC weighed the advantages and disadvantages of a RIF vis-a-vis furloughs. The three primary considerations in this equation were: (1) direct impact on the work force; (2) future consequences of the personnel action; and (3) impact on agency morale.

Furloughs presented problems with each of these three factors. First, furloughs would have a significant impact on almost 100% of the work force. Given the budget shortfall of the agency, each employee would be forced to take 10-13 days of furlough, which translates into approximately a 5% pay reduction per employee. Second, furloughs seemed only to postpone the inevitable need for a RIF. The agency had experienced declining budgets since 1979-80, and it felt there were no prospects that the budget for fiscal year 1990 would be larger than that for fiscal year 1989.[5] Finally, furloughs have a more negative impact on agency morale because they occur throughout the year. Agencies mandating furloughs spread the days out over the course of the year and the employees are continuously focusing on the furlough days rather than on the mission of the agency.

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[5] Although FTC informed its staff that the only reason for the RIF was a budget shortfall for fiscal year 1989, the Court was nonetheless persuaded by Walton's testimony that FTC did not anticipate an increased budget for fiscal year 1990. Transcript at 561.

A RIF provided a better solution. First, although more painful for those employees separated from their jobs, a RIF is more limited in scope so it impacts fewer employees. Second, a RIF would help the agency meet its budgets for the upcoming years. Finally, a RIF occurs at the beginning of the year, so the agency would be able to save money faster and the employees are able to return to work without constant reminders of the personnel action.

D. RIF Procedures

An agency that undertakes a RIF must follow certain procedures, codified at 5 C.F.R. § 351 *et seq*. It must establish competitive areas and, within the competitive areas, place all positions of the same grade and classification series in the same competitive level. *See* 5 C.F.R. § 351.403. At the FTC, each of the larger bureaus or offices, including the BC, is a separate competitive area.[6] All accountants in the BC were placed in competitive levels according to grade.

The agency then develops a retention register that lists employees in order of retention based on a number of factors, including length of service, performance ratings, and veterans preference. *See* 5 C.F.R. § 351.501. The employees with the lowest retention standing are the first to be separated during a RIF. *See* 5 C.F.R. § 351.601. Significantly, employees with veteran preference have a

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[6] The competitive areas used at the FTC were established during an earlier RIF and were not modified for the 1988 RIF. Only seven of the 23 competitive areas at FTC were subject to the 1988 RIF.

higher retention standing than non-veterans. *See* 5 C.F.R. § 351.701.

Certain employees in the competitive service have assignment rights known as bumping and retreating. The subtleties of bumping and retreating are irrelevant to the instant case, but it is significant to note that an employee with assignment rights cannot be separated and must be assigned to an occupied position or a vacant position that involves the least possible reduction in grade. 5 C.F.R. §§ 351.701, 351.704. Employees without assignment rights who are separated during a RIF may have rights to either severance pay or an annuity. *See* 5 U.S.C. § 5595, 5 C.F.R. § 550.701 *et seq.*

Within these parameters, the agency and the bureau directors have discretion when undertaking a RIF. They have discretion to determine which positions to abolish, whether to fill any vacancies that arise, and into which position to place an employee with assignment rights who is qualified for more than one position. *See* 5 C.F.R. §§ 351.201, 351.701.

E. The 1988 FTC RIF

Once the agency determined that a RIF was necessary, it developed an operating plan to implement the RIF. The FTC determined that 87 positions in the Washington D.C. office had to be abolished. The agency concluded that 28 employees would leave the agency voluntarily prior to the RIF and obtained approval to offer an additional 31 FTC employees early-out retirements.

The agency directors then met individually with the bureau directors to address the upcoming RIF. The agency directors advised the bureau directors to undertake the RIF in the manner that would have the least negative impact on their law enforcement efforts. The agency also instructed all bureau directors to consider grade-skills mix[7] issues in their decisions to abolish certain positions and to contemplate the impact of the RIF on all employees.

The BC was specifically instructed that it had to save $150,000 as a result of personnel actions. Before abolishing any permanent positions, the BC terminated all five of its temporary employees, four of whom were under age 40. Deputy Director Clark testified that "it seemed to me that we should not keep temporary employees on board if we were going to be riffing permanent employees. So I decided early on that they [the temporary employees] should be separated." Transcript at 624. Three of the temporary employees left the FTC shortly after receiving notice of the upcoming RIF, two remained until January 7, 1989. Transcript at 624-25; Plaintiffs' Exhibit 67.

The BC was then forced to abolish permanent positions. None of the support staff could be separated

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[7] Grade-skills mix includes two considerations. The first is a broad comparison of the overall number of attorneys, economists, accountants, and clerical support employed at the agency. The second consideration is a more narrow comparison of the grade levels maintained within each class of employee at the agency, for example whether the mix of attorneys was properly divided among grades 11-15.

because there were many vacancies due to the high turnover of secretaries. The BC determined that three administrative officers could be downgraded to support staff to fill several of the vacancies. Each of these downgraded employees was over 40 years old. Plaintiffs' Exhibit 78. The BC further agreed that three research analysts had to be separated, two of whom were over 40. Plaintiffs' Exhibit 78. In addition, three attorneys were separated to correct a grade-skills mix problem. One of these attorneys was over 40.[8]

The BC also examined the accountant work force, which had not declined with the diminishing budget over the past eight years. The bureau directors noted that there was a significant overlap in the responsibilities of the economists and the accountants.[9] Consequently, the BC determined that three accountants could do the work currently performed by eight. Transcript at 626. The five abolished positions were occupied by Quinn, McReady,

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[8] During the RIF, the agency recruited new attorneys to begin work in fiscal year 1990. This decision had two purposes. The new attorneys would not be paid out of the fiscal year 1989 budget so they would not impact the present shortfall. In addition, FTC had many grade 14-15 attorneys and few grade 11-12 attorneys. The new hires would begin at the lower grades to alleviate this grade-skills mix problem.

[9] Although Quinn testified that his work was essential to the agency, he admitted that any lawyer could perform his responsibilities. Transcript at 184. McReady conceded that the accountants and the economists "were working on the same issues, perhaps from different viewpoints." Transcript at 381. The Court also finds Personnel Director Straight's testimony that the work of the accountants duplicated the economists' to be highly persuasive. Transcript at 320, 325.

and three accountants in the Accounting Office: Ernest Cowan (age 39), Paz Fernandez (age 45), and Joseph Branch[10] (age 42).[11] Quinn, McReady, Fernandez and Branch were separated from the agency.

Cowan, a veteran, had assignment rights and therefore had to be offered another position at the same grade and salary, if possible. The FTC had several options with regard to Cowan. It could offer him a grade 12 research analyst position in one of the general litigation offices occupied by Robert Pickett, age 33; if FTC placed Cowan in Pickett's position, Pickett would be separated from the agency. The agency could also offer Cowan a grade 12 FTC Investigator position in the other general litigation office occupied by Linda Cunningham, age 36; Cunningham, however, had retreat rights to a grade 11 research analyst position from which she would have bumped Evelyn Boynton, who herself had retreat rights to a grade 6 secretary position. The agency had the further option to create a new grade 12 compliance specialist position in the PN Office for Cowan; it is this option that the agency chose.

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[10] Joseph Branch was a temporary employee but his position was abolished by the RIF. Transcript at 630.

[11] The only reason for the separation expressed in the November 14, 1988 memoranda was a shortage of funds. The Court finds credible, however, the testimony of Straight, indicating a concern on the part of the agency regarding the grade-skills mix problem and the disruptive effect of displacing too many employees. Transcript at 319-20, 594, 622.

II. Conclusions of Law

An employee can prevail on an ADEA claim under either a disparate treatment or a disparate impact theory of proof. Plaintiffs argued both of these theories, and each will be discussed below.

A. Disparate Treatment

The tripartite evidentiary scheme of *McDonnell Douglas v. Green*, 411 U.S. 792, 802-05 (1973), and its progeny, applies to disparate treatment claims under the ADEA. *See Cuddy v. Carmen*, 762 F.2d 119 (D.C. Cir.), *cert. denied*, 474 U.S. 1034 (1985); *Krodel v. Young*, 748 F.2d 701, 705 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 817 (1985). To succeed initially on this claim, plaintiffs must establish a *prima facie* case of discrimination by a preponderance of the evidence. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). There is divided authority regarding the quantum of proof required of a plaintiff to establish a *prima facie* case in the context of an employee separation. *See, Oxman v. WLS-TV*, 846 F.2d 448 (7th Cir. 1988). In the context of a RIF, it has been held that a plaintiff need only show he was separated and that others not in a protected class were treated more favorably. *Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F.2d 1393, 1395 (3d Cir.), *cert. denied*, 469 U.S. 1087 (1984).

Once a *prima facie* case has been established, a presumption of wrongful discrimination arises, *see United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 (1983), and the burden shifts to the employer to "articulate some legitimate, nondiscriminatory reason" for the challenged action. *McDonnell Douglas*, 411 U.S. at

802; *see also Burdine*, 450 U.S. at 257. It is important to note that the burden on the employer is merely one of production, because "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2747 (1993) (quoting *Burdine*, 450 U.S. at 253). If the defendant carries this burden of production, the burden shifts back to the plaintiff to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. *Burdine*, 450 U.S. at 252-53.

Plaintiffs established a *prima facie* case of age discrimination, albeit barely. Plaintiffs first claim that the BC's decision to place Cowan in the vacant compliance specialist position rather than in Pickett's position disadvantaged Quinn, age 52, and McReady, age 45, to the benefit of Pickett, age 33. Plaintiffs' Proposed Findings of Fact and Conclusion of Law ("Plaintiffs' Mem.") at 15 n.9. Second, plaintiffs assert that Quinn's position was abolished to force him into retirement due to his age. *Id.* at 17. Finally, plaintiffs argue that had Quinn's position not been illegally abolished to force him into retirement, McReady would have had retreat rights to that position. *Id.* at 19.

Defendants met their burden of producing evidence that age was not a determining factor in the employment decision. First, FTC conducted the RIF because it was faced with a shortage of funds, a legitimate reason. It choose [sic] to abolish five accountant positions because of a determination that the work of the accountants duplicated the work of economists and because there was

a disproportionate number of accountants compared to attorneys. Second, it was undisputed that the agency would have terminated Cowan but for his status as a preference eligible veteran. Transcript at 319, 630. FTC's decision to create a new position for Cowan and not displace Pickett or Cunningham was within agency discretion and helped achieve the legitimate agency goal of minimal disruption.

Plaintiffs cannot meet their final burden. There is no proof that any of the agency's decisions were a pretext for age discrimination. First, although the BC knew the retirement status of its employees, the decision to abolish Quinn's position was not based on age. The agency undertook the RIF due to a shortage of funds and it reasonably determined that there was an excess of accountants, that accountants' work duplicated that of economists and that the accountant work force had not downsized in proportion with the rest of the bureau over the previous eight years. The fact that Quinn was the only accountant in the PN Office does not alter this result. In fact, there was some question regarding the need for an accountant in the PN Office at all, and Quinn's position description was being revised at the time of the RIF. Plaintiffs' Exhibit 83.

Second, age was not a determining factor in the decision to place Cowan in the vacant compliance specialist position. If, as plaintiffs suggest, the agency had placed Cowan in Pickett's position, one of the general litigation offices and the PN Office would have been disrupted. Despite Quinn's prior training, there would undoubtedly have been a period of adjustment in the PN Office while Quinn became accustomed to his new job

and the PN Office adjusted to him. By placing Cowan in the PN Office, that office still experienced a disruption, but the general litigation office did not. The BC, therefore, achieved its goal of minimizing disruption. Moreover, there is no evidence to suggest that the BC would have placed Quinn in the vacant compliance specialist position had it placed Cowan in Pickett's position. The undisputed testimony was that the position was created for Cowan and that the BC would have left the position vacant if it did not place Cowan in it. Transcript at 636, 352.

B. Disparate Impact

Disparate impact occurs when an employer's business practice, although neutral on its face, operates to disproportionately disfavor a protected group in a manner that cannot be justified by a business necessity. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). A disparate impact case proceeds in three phases. First, the plaintiff must establish a *prima facie* case by showing that a facially neutral employment practice had a significant impact on a protected group. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). It is not necessary for the employee to prove a discriminatory intent on the part of the employer. *See Fisher v. Transco Services-Milwaukee, Inc.*, 979 F.2d 1239, 1245 (7th Cir. 1992).

Once a plaintiff establishes a *prima facie* case, the burden shifts to the employer to show that the challenged practice constituted a business necessity. *Griggs*, 401 U.S. at 431. If the employer meets this burden, the plaintiff must then prove that there were available alternatives

with a lesser disparate impact that serve the business needs of the employer. *See MacPherson v. University of Montevallo,* 922 F.2d 766, 771 (11th Cir. 1991).

Plaintiffs have failed to establish a *prima facie* case of disparate impact. The employment practice of which plaintiffs complain is the decision by the BC to address the grade-skills mix imbalances in determining which positions to abolish. Plaintiffs' Mem. at 12 n.8. Plaintiffs argue that this facially neutral decision had an adverse impact on employees age 40 or older because "11 of the 14 (78.6%) [of the BC] employees adversely affected by the RIF were age 40 and over, whereas only 100 of the 201 (49.8%) of the 'qualified population' of [BC], employees were age 40 and over on November 14, 1988 when RIF notifications were issued." *Id.*

It is undisputed that these statistics present a statistically significant disparate impact. Nonetheless, by focusing solely on the employee registers on November 14, 1988, plaintiffs' data is unreliable. It excludes SES employees who are not listed on those registers and ignores the agency's decisions to separate the temporary employees and to offer early-out retirements. These two decisions were directly attributable to the budget shortfall and their impact should be considered in the statistical analysis. The inclusion of these employees in the sample alters the statistical results to the point where they are no longer statistically significant.[12] See Transcript at 458-70.

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[12] The Court also notes that seven of the eight accountants in the BC were over 45 which may impact the results further.

Even if plaintiffs had established a *prima facie* case of disparate impact, however, they cannot prevail. The agency established a business necessity for their decision. As earlier observed, it was undisputed that FTC faced a substantial budget shortfall for fiscal year 1989, and that it considered all possible means of trimming the budget before it resorted to a personnel action. The agency also carefully considered furloughs and concluded that they were not appropriate. Once FTC established this necessity, plaintiffs failed to establish available alternatives with a lesser disparate impact. Plaintiffs suggested that it was possible to reduce bonuses and other nonmandatory incentives paid to the remaining employees to save enough money to reduce the scope of the RIF. Transcript at 266-67. The bonuses, however, were not excessive and the Court cannot disagree with defendant's assertion that they were necessary to boost morale at a time when indisputably morale is particularly low. Transcript at 585, 607-08.

Plaintiffs' arguments amount to nothing more than an expression of their understandable dismay with the agency's ultimate personnel decisions. Although plaintiffs. have earnestly presented a scenario that includes their individual job protection, they cannot prove that age was a determining factor--nor even a factor at all--in the decisions that were made, and, thus, they cannot prevail under either theory of proof.

III. Conclusion

Based upon the findings of fact and conclusions of law stated above, it is hereby

ORDERED that judgment is entered on the accompanying judgment page in favor of defendants Janet D. Steiger, Chairman of the Federal Trade Commission, and the Federal Trade Commission and against plaintiffs Edward C. McReady and Martin J. Quinn.

IT IS SO ORDERED.

March 28, 1994

/s/ Joyce Hens Green
JOYCE HENS GREEN
United States District Judge

United States Court of Appeals
For The District of Columbia Circuit

No. 94-5141 **September Term, 1994**
USDC CV 90-1457

Edward C. McReady,
Martin J. Quinn,

Appellants,

v.

Janet D. Steiger, Chairman, FTC.,

Appellee

BEFORE: Edwards, Chief Judge; Ginsburg and Henderson, Circuit Judges

ORDER

(Filed May 11, 1995)

Upon consideration of appellants' Petition for Rehearing, filed April 5, 1995, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

STATUTES AND REGULATIONS

The *Age Discrimination in Employment Act* ("ADEA"), codified as amended at 29 U.S.C. §621 *et seq.*, provides in pertinent part as follows:

> §623. *Prohibition of age discrimination*
>
> *(a) Employer practices.* It shall be unlawful for an employer — (1) . . . to discharge any individual . . . because of such individual's age;. . . .
>
> * * *
>
> *(f) Lawful practices . . . ; other reasonable factors.* . . . It shall not be unlawful for an employer . . . (1) to take any action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age; . . . .
>
> * * *
>
> §628. *Rules and regulations; exemptions.* . . . [T]he Equal Employment Opportunity Commission ["EEOC"] may issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter, and may establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest.
>
> * * *
>
> §631. *Age limits*
>
> (a) *Individuals at least 40 years of age.* The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.
>
> * * *

> §633a. *Nondiscrimination on account of age in Federal Government Employment.*
>
> *(a) Federal agencies affected.* All personnel actions affecting employees . . . who are at least 40 years of age . . . in executive agencies . . . shall be made free from any discrimination based on age.
>
> *(b) Enforcement by [EEOC].* . . . * * * The [EEOC] shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section.
>
> *(c) Civil actions; jurisdiction; relief.* Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.

Pertinent federal regulations promulgated by the EEOC under the ADEA at 29 CFR §1625.7(d) provide:

> When an employment practice . . . is claimed as a basis for different treatment of employees . . . on the grounds that it is a "factor other than" age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity. * * *

The *Civil Service Act* ("CSA"), codified as amended in scattered sections of Title 5 of the U.S.C., provides in pertinent part as follows:

> §5595. *Severance pay.*
>
> (a) For the purpose of this section . . . (2) "employee" . . . does not include . . . (iv) an

employee who is subject to . . . any . . . retirement statute or retirement system . . . and who, at the time of separation from the service, has fulfilled the requirements for immediate annuity under such a statute or system; . . . .

(b) . . . [A]n employee who — (1) has been employed currently for a continuous period of at least 12 months; and (2) is involuntarily separated from the service, not by removal for cause on charges of misconduct, delinquency, or inefficiency; is entitled to be paid severance pay in regular periods by the agency from which separated. * * *

§8336. *Immediate retirement.*

* * *

(d) An employee who — (1) is separated from the service involuntarily, except by removal for cause on charges of misconduct or delinquency . . . after completing 25 years of service or after becoming 50 years of age and completing 20 years of service is entitled to an annuity. * * *

* * *

§8348. *Civil Service Retirement and Disability Fund.*

(a) There is a Civil Service Retirement and Disability Fund. The Fund . . . is appropriated for the payment of . . . benefits as provided by this subchapter or by the provisions of chapter 84 of this title which relate to benefits payable out of the Fund; . . . .

(b) The Secretary of the Treasury may accept and credit to the Fund money received in the form of a donation, gift, legacy, or bequest, or

otherwise contributed for the benefit of civil-service employees generally.

* * *

Pertinent federal regulations promulgated under the CSA for reduction-in-force actions at 5 CFR Part 351:

§351.201. *Use of regulations.*

* * *

(a)(2) Each agency shall follow this part when it releases a competing employee from his or her competitive level by furlough for more than 30 days, separation, demotion, or reassignment requiring displacement, when the release is required because of lack of work; shortage of funds; insufficient personnel ceiling; reorganization; . . . when such action will take effect after an agency has formally announced a reduction in force in the employee's competitive area and when the reduction in force will take effect within 180 days.

* * *

§351.202. *Coverage.*

* * *

(b) *Employees excluded.* This part does not apply to an employee: (1) In a position in the Senior Executive Service; . . . .

* * *